

in . . . the local exchange and access markets."¹⁰ The study also found that any competitive entry that develops in the next decade is "unlikely to be sufficient to eliminate or even significantly reduce the control of essential facilities by the [LECs]."¹¹ These findings are particularly striking, given the fact that LEC access prices substantially exceed their economic cost.

Because the LECs' monopolies are virtually intact, the Commission should not expend its resources on a substantial revamping of LEC price cap regulation.¹² Neither does it need to define at this time the procedures and market conditions under which it might adopt streamlined regulation for the LECs' access services. Instead, the Commission should devote its resources to assuring that the

¹⁰ Economics and Technology, Inc. and Hatfield Associates, Inc., The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers, p. 5 (February 1994); see also id., pp. 31-32, 79-80, 151-52.

¹¹ Id., p. 4.

¹² On the other hand, it may be appropriate to make a small number of the price cap modifications proposed in the SFNPRM now, because they may eliminate regulatory requirements that are unnecessary notwithstanding the LECs' monopoly status. See Section III below. However, such modifications should be reviewed on a stand-alone basis in light of the existing monopoly conditions. See SFNPRM, ¶ 110. Such an approach is consistent with the Commission's traditional and conservative approach to reducing regulation for dominant carriers. See, e.g., AT&T Nondominance Order, nn. 74, 75.

preconditions to effective competition are in place in the access and local exchange markets.¹³

AT&T's Phase I Comments (pp. 16-18) detail nine specific steps that are necessary -- but may not be sufficient -- to allow effective competition to develop in the access and local exchange markets. These conditions include:

- (1) elimination of state franchise restrictions;¹⁴
- (2) effective and nondiscriminatory access for competitors to conduits and rights of way;
- (3) LEC unbundling of basic network functions;
- (4) full and nondiscriminatory interconnection rights with LECs;
- (5) LEC duties to furnish unbundled network functions on reasonable request and pursuant to uniform technical standards;

¹³ The Commission expressly recognizes the relationship between the interstate access and local exchange service markets. See SFNPRM, ¶ 7 ("[w]e are of the view that interstate switched access competition cannot reach meaningful levels so long as end-users are exclusively reliant upon the incumbent LEC's switch to direct calls to interexchange carriers"). See also id., n.31 (Commission's intention in refining the LEC price cap plan is to advance the goal of "fostering an efficiently competitive local market").

¹⁴ The SFNPRM (¶ 109) is clearly correct that elimination of state-imposed entry barriers to the local service market is necessary to enable effective competition to emerge in the interstate access market.

- (6) elimination of restrictions on competitors' rights effectively to resell LEC services;¹⁵
- (7) nondiscriminatory rates for unbundled LEC network functions;
- (8) rates for basic network functions and basic network elements that are based upon total service long run incremental costs; and
- (9) full local number portability, with local numbers managed by an impartial administrator.

Until all of these conditions have been in place for a reasonable time, there is no prospect that effective facilities-based competition could emerge for either access or local exchange services.¹⁶

Further, the SFNPRM (§§ 24-26) clearly recognizes that "rate regulation may distort the prices access customers pay" and that regulations which force rates above (or below) their actual costs lead to economically

¹⁵ The lack of appropriate resale pricing was particularly apparent in Rochester. See SFNPRM, § 110. There, the LEC's 5% wholesale discount was so inadequate that the Rochester experiment could not test the commercial viability of resale. Moreover, the LEC's ordering and provisioning processes were discriminatory and reflected an unwillingness to devote appropriate resources to serving resellers.

¹⁶ The SFNPRM (§ 108) references many, but not all, of these conditions. AT&T firmly believes that LECs could (and would) stifle effective competition if any of these conditions is not met in a specific market. Moreover, the only type of competition the Commission should review is that from facilities-based providers. Resale-based competition is insufficient to limit a LEC's ability to control service quantities. See Appendix A, pp. 14-15.

inefficient results. Thus, the Commission should also take decisive action now to assure that prices for access services are based upon actual economic costs and are not burdened with regulatory subsidies or excess contributions that distort behavior by the LECs, by their access and end user customers, and by their potential competitors.¹⁷ Indeed, the Commission cannot hope to achieve its stated goal of promoting economic efficiency (SFNPRM, ¶ 18) if access reform does not precede significant price cap reform. Otherwise, some potential competitors will be encouraged to make uneconomic investments, while others will be discouraged from entering markets where competition would be viable but for the distortions in access prices, thus depriving consumers of the benefits of efficient competition.

II. THE SFNPRM FAILS TO ESTABLISH APPROPRIATE CRITERIA FOR DETERMINING THE EXISTENCE OF ACTUAL COMPETITION IN THE ACCESS AND LOCAL EXCHANGE MARKETS.

The Commission has correctly determined that significant reductions in regulation should follow a demonstration of actual competition.¹⁸ The Commission also

¹⁷ AT&T's proposal on how to achieve comprehensive access reform and eliminate subsidies that undermine the possibility for effective competition was recently submitted in AT&T's Comments in CC Docket No. 80-286, filed October 10, 1995. Those comments are incorporated herein by reference.

¹⁸ See SFNPRM, ¶ 106.

recognizes that proof of competition for access and local exchange services must be based upon economically viable definitions of the markets in which the competition is alleged to exist.¹⁹ However, the SFNPRM's proposals fall far short of the rigor necessary to determine whether effective competition exists. Thus, they will not adequately protect access customers or consumers from the LECs' acknowledged monopoly power.

A. The Existing Price Cap Categories Are Insufficient To Define An Appropriate Product Market.

The SFNPRM (§ 117) properly notes that the single market definition the Commission developed for interexchange services is inappropriate for LEC services. However, the SFNPRM's proposal (§ 118) to define the relevant product markets by using only the existing price cap service categories is insufficient to protect access customers or consumers.

The SFNPRM's proposal is inadequate for two reasons. First, the access service categories in the LEC price cap baskets do not represent stand-alone services or economic product markets that reflect the LECs' actual market power. Access purchasers need to acquire all of the components of interstate switched access in order to make any switched service available to an end-user customer.

¹⁹ SFNPRM, § 116.

Indeed, the LECs frequently offer each access component in conjunction with all of the others. Thus, unlike the complete end-user interexchange services the Commission has previously reviewed, the LECs' market power cannot be assessed by reviewing individual access components in isolation.²⁰

Second, different access components face different levels of competition at different times and in different places.²¹ Accordingly, even if some components face some (or even substantial) competition in some markets, other components -- particularly local loops -- will remain bottleneck monopolies well into the future. Thus, again unlike the earlier review of interexchange services, the Commission's model for reducing its regulation of LEC access services must account for continuing LEC bottleneck control of at least some, if not all, such components.²²

²⁰ The SFNPRM (§ 131) recognizes these differences between LEC and interexchange services ("LEC service baskets, organized around network functionalities, differ substantially from the AT&T baskets, which are organized according to end users services").

²¹ See SFNPRM, § 124.

²² All of the Commission's reviews of AT&T's market power for purposes of determining how to reduce regulation in the interexchange market occurred after AT&T had unequivocally severed all control over bottleneck facilities by divesting its local exchange affiliates -- the very monopolies which are pressing for reduced regulation here.

In Appendix A, Dr. B. Douglas Bernheim describes a technique for defining product markets that accounts for the important differences between interexchange and LEC services.²³ In particular, he addresses the interrelationship between access components, and he describes a way that regulation of some access components could be reduced even if a LEC retains its bottleneck monopoly over other components.²⁴

Dr. Bernheim recommends that LEC access components be grouped into "bundles" for purposes of product market definition. A separate bundle would be created for each combination in which such components are used to provide access services. Thus, for example, if access were comprised of only three components (transport, switching and local loops) there would be seven product "bundles": transport only; switching only; local loops only; transport and switching; transport and local loops; switching and local loops; and all three components together.

A product bundle could be granted reduced regulation when each component in that bundle is subject to effective competition. Thus, if only the transport

²³ Appendix A, pp. 21-22.

²⁴ The Bernheim approach is substantially more liberal than its alternative, which would be to withhold reduced regulation for any access component until all are subject to effective competition.

component were subject to effective competition in a relevant geographic market, regulation of the "transport only" bundle could be reduced in that area. Regulation of the other six bundles would not be affected, however, because they all contain non-competitive components. If both transport and switching were subject to effective competition in a relevant market, three bundles (transport only; switching only; and transport and switching) could be granted reduced regulation. The remaining bundles, each of which contains the non-competitive local loop component, would remain subject to price caps until there is effective competition for that component. This product market definition permits the most rapid form of reduced regulation that also provides access customers and consumers protection against LEC efforts to leverage their monopoly power over non-competitive access components.²⁵

B. The Commission's Standard For Defining The Relevant Geographic Market Has A Critical Impact In Determining Whether There Is Effective Competition.

The need for properly defined geographic markets is crucial, because "defining the relevant geographic market

²⁵ This analysis can also be used to assess whether LEC interexchange services should be granted reduced regulatory treatment. As long as a LEC exercises market power over any component of the bundle of services used to provide its interexchange service -- including any of the components of switched access -- the LEC service should remain subject to price cap regulation. See Appendix A, n.16.

incorrectly will misstate competition."²⁶ The SFNPRM (§ 120) recognizes that the supply and demand elasticities for a LEC's access components in a particular area will differ from those in other geographic areas served by it or another LEC. Thus, the Commission seeks comments on its proposal to define the geographic market for access services by using the LEC "density zones" for expanded interconnection service. Id.

The SFNPRM (§ 124) correctly notes that the LECs' density zones are based only on the traffic densities and cost characteristics of the trunking basket. Thus, at most, density zones might potentially be used to define the geographic market for trunking services. In all events, there does not appear to be any rational basis at all to use trunking density zones as the geographic market for other access components.²⁷ Therefore, the Commission should look at each access component separately to define its relevant geographic market, using the criteria discussed below. For example, the relevant geographic market for switching may be broader than for access components that use facilities such as trunks and local loops, provided that the cost of routing

²⁶ SFNPRM, § 120.

²⁷ Even the Commission recognizes these zones "may not be useful in defining relevant geographic markets for services in the traffic sensitive, common line and interexchange baskets." SFNPRM, § 124.

calls to a remote switch is not prohibitive.²⁸ Indeed, Dr. Bernheim concludes that "it is almost certainly inappropriate to use identical geographic boundaries to establish markets for all access components."²⁹

The identification of appropriate geographic boundaries for a relevant market generally depends on two factors: (a) the extent to which customers can effectively substitute a product purchased at one location for a product offered at another, and (b) the principal vendor's ability to charge different prices for identical products at different locations.³⁰ Access customers' ability to buy access services in one area for their end user customers in another area are extremely limited. For example, an IXC that purchases transport from a CAP does not have a competitive source of supply to serve an end user customer located a single block away from the CAP's facilities.³¹ Therefore, the substitution factor argues strongly for narrow geographic boundaries defined solely by the pervasiveness of actual competition in the proposed market.

The need for narrowly defined boundaries may, however, be somewhat mitigated if LECs must charge uniform

²⁸ See Appendix A, p. 7.

²⁹ Id., pp. 7-8.

³⁰ Id., p. 6.

³¹ Id., p. 7.

prices over broader areas for access components that are identical in quality, terms of interconnection and conditions of service. In such a situation, the LECs must set their prices on the basis of the total demand in the area subject to the geographic averaging requirement.³² Even in these cases, however, the Commission also needs to consider the relative amount of traffic in the competitive and non-competitive areas that are combined for purposes of defining the market. If the volume of traffic in the non-competitive area is large compared to the volume in the competitive area, even a strict averaging requirement will not sufficiently limit the LEC's monopoly power in the non-competitive portions of the geographic market.³³

Thus, the Commission's goal of economic efficiency requires either very narrow geographic boundaries for access components (the actual area of substitutable competition) or strict limitations on the LEC's ability to discriminate in terms of price and other key conditions within the entire geographic market after regulation is reduced. In the latter case, the Commission must also be assured that the

³² Appendix A, pp. 8-11.

³³ Id., p. 10. If, for example, the traffic volumes in the non-competitive geographic region comprised a large majority of the traffic in the entire geographic market, the impacts of competition in the competitive area would not be sufficient to discourage the LEC from raising prices throughout the market.

amount of traffic in the competitive portions of the market equals or exceeds the traffic in the non-competitive areas. Alternatively, if the Commission does not impose strict limitations on the LECs' ability to discriminate in price, it must insist that competition be pervasive in all portions of the geographic market.³⁴

C. A "Checklist" Procedure Is Insufficient To Review LEC Requests For Reduced Regulation.

After the competition-enabling conditions described in Part I above have been established and have had a reasonable time to operate, the Commission could assess the competitiveness of the relevant markets to determine whether it is appropriate to reduce regulation of the LECs. In all events, the SFNPRM (§ 106) correctly recognizes that no LEC services should be removed from price caps until the LEC makes an affirmative showing of actual competition in each relevant market.

A showing of effective actual competition cannot, however, be based simply on meeting a "checklist" such as that described in the SFNPRM (§ 110), which consists solely of preconditions to competition.³⁵ Rather, any showing offered to support reduced regulation must include specific measurements which confirm the actual presence of

³⁴ Appendix A, pp. 10-11.

³⁵ Id., p. 11.

substantial facilities-based competition in the relevant product and geographic market. AT&T's Phase I comments (pp. 18-19) proposed three specific criteria that would suggest the existence of effective competition:

1. There are at least two alternative providers who are not dependent on the LEC for the facilities they use to provide service;
2. The alternate providers are available to at least 75% of the subscribers in the relevant market; and
3. At least 30% of subscribers in that market in fact use such alternate facilities-based providers.

These criteria take into account the supply and demand responsiveness and market share factors the Commission has previously used in assessing market power in the interexchange services market.³⁶ They are also similar to the criteria the Commission used in reducing its regulation of AT&T.³⁷ Such criteria could serve as a

³⁶ AT&T agrees with the SFNPRM (§ 143) that market share may not be a dispositive factor in determining market power, especially if there are high supply and demand elasticities in the market. However, given the LECs' near-total control of access services and the limited impacts of potential competition in the access market (see Appendix A, pp. 12-14), the LECs' current market share is indeed a true reflection of their monopoly power. AT&T also agrees with the SFNPRM's conclusion (§ 145) that evidence of LEC pricing below the price cap ceiling should only be considered as an indication of competitiveness in areas where there are high supply and demand elasticities.

³⁷ See, e.g., Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd. 5880 (1991);

sufficient prima facie showing of competition by a LEC, permitting it to obtain reduced regulation unless another party produces credible evidence that the identified market is not subject to effective competition. Once challenged with credible evidence, however, the presumption of competitiveness should be negated and the burden of proof should shift to the LEC.

The Commission must also establish an appropriate process to review individual LEC requests for reduced regulation.³⁸ Because such requests involve critical competitive and consumer interests, the SFNPRM (§ 114) correctly states that LEC requests should not be reviewed as part of the tariff filing process. For the same reason, as well as the "checklist" problem described above, they should also not be left to a "certification letter" process.³⁹ Rather, as in the interexchange market, each application for relaxed regulatory treatment should be reviewed on its own

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AT&T Nondominance Order. From an economic standpoint, AT&T's proposed measurements are in fact insufficiently demanding. See Appendix A, p. 18. Indeed, regulation of AT&T's services was streamlined only long after it had satisfied these measurements.

³⁸ The procedures recommended here could apply to any request for a relaxation of the price cap rules, including, but not limited to, a request for streamlining.

³⁹ See SFNPRM, § 113.

merits after all interested parties have been given an opportunity to comment.⁴⁰ There should be no grants of relief for any LEC which fails to meet the specific objective criteria described above.

III. LEC PRICE CAP REGULATION SHOULD NOT BE RELAXED IN MERE ANTICIPATION OF THE EMERGENCE OF COMPETITION IN THE ACCESS AND LOCAL EXCHANGE MARKETS.

The SFNPRM proposes numerous modifications to the LEC price cap plan, which include: (1) clarifying and simplifying the treatment of new services, and (2) granting downward pricing flexibility and changing the price cap basket/service band structure. The Commission generally proposes to adopt the price cap rule changes "without regard to the current level of competition because they will serve [the Commission's] goals of moving price toward costs, encouraging efficient investment in infrastructure, and ultimately robust competition."⁴¹ According to the SFNPRM, the Commission's proposed "relaxation" of price cap

⁴⁰ Possible ways of proceeding are by a petition for rulemaking, if the LEC seeks any modification of existing price cap rules in connection with its request for reduced regulation, or by motion or petition for declaratory ruling, if the LEC seeks no additional changes in the Commission's rules. All of these methods should be followed by a reasonable public notice and comment period.

⁴¹ SFNPRM, ¶ 2.

regulation will not cause competitive harm.⁴² The Commission seeks comment on these tentative conclusions in the context of its specific reform proposals.

As shown in the following sections, most of the changes proposed by the Commission would give the LECs an unprecedented degree of pricing flexibility. They would not serve the Commission's general objectives as stated in earlier phases in the LEC price cap proceedings nor the specific objectives identified in the SFNPRM.

As the Commission has properly concluded, because the LECs "retain substantial market power in providing local exchange and access services, regulation continues to be needed to achieve the goals of the Communications Act, and to increase consumer welfare."⁴³ The original goals of the price cap plan -- "just, reasonable, and nondiscriminatory rates, as well as a communications system that offers

⁴² SFNPRM, ¶ 29. The Commission defines "competitive harm" in "terms of the ability of a LEC to prevent prices paid by access customers from moving toward their efficient economic cost or to reduce the quality or range of services provided to access customers or to impose unreasonable endogenous barriers to entry." Id., ¶ 28. It also includes "LEC actions that could affect adversely competition in the interexchange market." Id. Most fundamentally, "competitive harm" thus includes the LECs' ability to engage in monopoly pricing, cross-subsidization, predatory pricing, and unreasonably discriminatory pricing. Id., ¶ 19.

⁴³ First Report, ¶ 92.

innovative, high quality services"⁴⁴ -- should continue to guide the Commission. Price cap regulation has been successful in incrementally reducing rates for consumers without protracted regulatory proceedings, while simultaneously providing the LECs increased incentives to become more efficient, productive and innovative.

Thus, until objective criteria demonstrating the existence of actual and meaningful local exchange and access competition can be satisfied, the Commission should maintain detailed price cap controls and procedures to ensure the reasonableness of interstate access rates and to achieve the Commission's stated objectives. The Commission must not lose sight of its statutory imperative that "in considering possible revisions to the LEC price cap plan, our primary goal will be to maximize the benefits of the plan to consumers and society, in accordance with the purposes and requirements of the Communications Act."⁴⁵

For the most part, the Commission's proposed price cap reforms would not further the public interest and should not be adopted at this time. First, certain of the

⁴⁴ See Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd. 6786, 6787 (1990) ("LEC Price Cap Order"), recon. 6 FCC Rcd. 2637 (1991) ("LEC Price Cap Reconsideration Order"), further recon. 6 FCC Rcd. 4524 (1991), second further recon. 7 FCC Rcd. 5235 (1992), aff'd sub nom. National Rural Telecommunications Association v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

⁴⁵ First Report, ¶ 93.

substantive modifications would afford the LECs undue flexibility that could result in increased rates and discriminatory strategic pricing. Second, the suggested procedural changes would not allow for sufficient review of LEC pricing for their access services, and would allow de facto broadscale revisions of the Part 69 Access Charge Rules without the safeguards attendant to a rulemaking or the usual waiver process. Nonetheless, with certain modifications and safeguards, some of the proposed reforms to the price cap plan could be adopted now to enable access prices to move closer to costs, without these untoward effects.

A. The Current Cost Support And Notice Requirements For New Services And Restructures Should Be Retained.

The Commission proposes to substantially relax the regulatory treatment of new services by creating two categories of new services. Track 1 services would be subject to the current 45-day notice and detailed cost support requirements.⁴⁶ For Track 2 services, however, the

⁴⁶ SFNPRM, ¶ 45. The current rules require a LEC to identify the direct costs of a new service which must be based on a consistent costing methodology for all related services. The methodology for assigning overhead costs, if any, to the new service must be justified, although overhead loadings need not be uniform. Prices must exceed direct costs, ensuring that they are not predatory. Also, according to the Commission, the rules regarding overhead costs establish a "flexible cost-based upper bound" on the pricing of new or substitute services. Id., ¶ 41 (citations omitted).

notice requirement would be reduced to 14 days and the LEC would only have to show whether the service recovered all of its direct costs.⁴⁷

There is no basis for relaxing the price cap treatment for any new services. The current cost showing, which includes a requirement that the LEC justify its overhead allocations, is an important factor in determining whether a LEC is pricing its service reasonably. By contrast, and at best, a direct cost showing could only demonstrate that a LEC is not pricing a new service predatorily; it does not guard against a LEC pricing a monopoly service too high.

The ability of interexchange carriers ("IXCs") to meet the evolving market-driven needs of their customers is vitally dependent on their ability to obtain new access services at reasonable, nondiscriminatory rates. Relaxation of cost support requirements for new services would frustrate this objective. No access customer has urged the Commission to relax the cost support required for introduction of new services. Indeed, as USTA admitted last year, the LECs have introduced approximately 440 new services in the little over three years that price caps had

⁴⁷ SFNPRM, ¶ 49.

then been in effect.⁴⁸ Given these facts, the Commission has not tentatively concluded -- nor could it ultimately conclude -- that the current test imposes undue administrative burdens on the filing carrier, or that modification of the test would in any way further consumer interests. To the contrary, there is every reason to expect that it would not.⁴⁹

Not only would the reduction of the cost support requirements allow the LECs to price their new services unreasonably, but the 14-day notice period would not afford sufficient time for meaningful objection and Commission review.⁵⁰ Indeed, the 14-day notice period was crafted for filings deemed presumptively lawful,⁵¹ which "new services"

⁴⁸ See AT&T Reply Comments, CC Docket No. 94-1, June 29, 1994, p. 39, citing USTA Comments, id., May 9, 1994, p. 18.

⁴⁹ There is little question that the LECs would exploit any flexibility afforded to them to disadvantage their access customers and price their service at whatever monopolistic level or discriminatory manner that the market would bear. See, e.g., U S WEST Communications, Transmittal No. 487, Order, DA 94-1333, released November 29, 1994 (rejecting a proposed term and volume plan with geographic restrictions as unreasonably discriminatory); see also Local Exchange Carrier Line Information Database, 8 FCC Rcd. 7130, 7132, 7144 (1993) (finding that LEC LIDB rates based "on what the market would bear" to be unlawful).

⁵⁰ The Commission's rules only allow 6 days for filing of a petition to reject or suspend a tariff filed on 14 days' notice. See 47 C.F.R. § 1.773(a)(2)(i) (1994).

⁵¹ See 47 C.F.R. § 61.58(c)(2) (1994) (14 days' notice for below cap, within band filings that change a rate level,

are not.⁵² Given the captive customer base for access services and the fact that, as a general proposition, a shorter period is not needed to allow more rapid introduction of new offerings, the notice period should not be reduced.⁵³ To the extent that the introduction of new services (such as access for 500 and advanced intelligent network services) has been delayed, the LECs themselves, not

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add a geographic location, eliminate a rate element, etc.).

⁵² The Commission just recently reaffirmed the need for a 45-day notice period for the LECs' new video dialtone services to allow time for adequate review. Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, CC Docket No. 94-1, Second Report and Order and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd. 11098, 11103 (¶ 28) (1995).

⁵³ In the unlikely circumstance that access customers' service needs could not be timely met, a LEC could, of course, seek to expedite the effective date of a pending new service tariff if there is no intervention. If the Commission nonetheless decides to reduce the notice period, it should require tariffs introducing new services to be filed on at least 30 days' notice. This would afford potential intervenors 15 days to file their petitions and allow for timely Commission review. See 47 C.F.R. § 1.773(a)(2)(iii) (1994). If the Commission adopts procedures to allow a LEC to request Track 2 treatment of a new service, it should ensure that interested parties have an adequate opportunity to review and comment on the LEC's request regardless of how it is presented (e.g., as a request for waiver of the Part 61 rules or for declaratory ruling). In no event should Track 2 treatment be based solely on a LEC certification letter or be allowed because the Bureau fails to act within a specified timeframe. SFNPRM, ¶ 48.

the regulatory process, have been a major cause of the delay.

Although the Commission proposes to maintain the existing price cap support requirements for restructures (i.e., showing of PCI, API, SBI), it similarly proposes to reduce the 45-day notice requirement.⁵⁴ The SFNPRM suggests, for example, that restructures that increase rates could be filed on 15 days' notice, and restructures which reduce rates could be filed on even shorter, i.e., 7 days' notice.⁵⁵ There is no reason to reduce the notice period for restructures. Restructured services supersede the existing variant of an offering and thus, like new services, demand careful review. Moreover, if a shorter notice were allowed for restructures that reduce rates, it would be all too easy for the LEC to "game the process" by introducing a restructure on short notice and later raising the price.

B. Alternative Pricing Plans Should Be Treated As New Services.

The Commission proposes to revise the definition of "new services" to exclude Alternative Pricing Plans ("APPs") that offer discounted optional rates for a service

⁵⁴ Under price caps, a "restructured service" replaces an existing service and thus does not expand the range of services available. SFNPRM, ¶ 20.

⁵⁵ SFNPRM, ¶ 51.

that continues to be offered.⁵⁶ Under the Commission's proposal, an APP would be distinct from either a new service or a restructure, and could, for example, be introduced on 14 days' notice and without cost support for 90 days. After that time, APPs could be converted to new services, on 45 days' notice and with cost support under Section 61.49. The Commission also asks whether it should allow LECs to offer APPs other than those term and volume discounts which are currently allowed, "so long as the LEC continues to offer the standard service offering of which the APP is an optional discount plan."⁵⁷

⁵⁶ SFNPRM, ¶ 52. Under price caps, "new services are . . . defined as services that add to the range of options already available to customers." Id., ¶ 40. Thus, under current rules, an APP is a new service, even though it is "functionally indistinguishable from an existing service" simply because it is offered under different rates, terms and conditions. Id.

⁵⁷ SFNPRM, ¶ 59. The Commission has allowed the LECs to implement term and volume plans for special access, and also for switched transport (entrance facilities, direct-trunked transport, and tandem-switched transport) once expanded interconnection becomes operational and collocation reaches a sufficient level to "demonstrate[] that the LECs' expanded interconnection tariffs provide a viable competitive opportunity." See Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase I, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd. 7374, 7423-24 (¶ 93) (1993) ("Switched Access Interconnection Order"); Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369, 7491 (¶ 262) (1992) ("Special Access Interconnection Order").

The Commission should continue to review APPs under the "new services" test. The key issue with any APP is whether it is unreasonably or unjustly discriminatory. Cost support is essential to determine whether the LEC is recovering its costs via an APP or will be burdening other customers. If the Commission allowed LECs the flexibility to offer APPs -- for any period of time -- without an opportunity for thorough review of their potential for discrimination, it would be abandoning its duty to ensure that rates are not unlawfully discriminatory. Discrimination is a real concern in the LEC environment, where competition is extremely limited.⁵⁸

A number of the LECs have sought to introduce non-cost-based percentage or growth discount plans, which would have provided customers with high growth rates a substantially lower effective per-minute rate for switched access than customers with the same amount (and sometimes higher levels) of traffic but with lower growth rates.⁵⁹

⁵⁸ By contrast, the Commission's concerns as to the discriminatory impact of AT&T's optional calling plans and promotions were misplaced because of fierce competition in the interexchange market. See Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, Further Notice of Proposed Rulemaking, 10 FCC Rcd. 7854 (1995); see id., AT&T Comments, filed July 3, 1995, pp. 16, 21; AT&T Reply Comments, filed July 24, 1995.

⁵⁹ See, e.g., AT&T Comments on NYNEX Telephone Companies Petition for Waiver of Part 69 of the Commission's Rules to Offer the Vermont Market Plan, DA 93-1005, filed September 8, 1993, pp. 3-4; NYNEX Motion to Withdraw Waiver Petition, filed September 30, 1994. See also AT&T

Such plans clearly distort competition in the interexchange market. To guard against this discriminatory potential -- which would only be exacerbated to the extent the LECs also offer interexchange services -- the Commission should retain the cost showing requirements of the current new service test for APPs.

In addition, the Commission should not allow term and volume pricing plans for switched access other than those already permitted for various local transport elements (see n.57, supra). First, term and volume plans should not be permitted for rate elements which constitute non-cost-based subsidies for the LECs' local services, such as the residual interconnection charge ("RIC") and carrier common line charge ("CCLC"). Any discount for such elements would necessarily be non-cost-based and would simply allow the LEC to discriminate among access customers as to who should bear the greatest subsidy burden. Second, because of the absence

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Comments on GTE Telephone Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Offer a Switched Access Discount Plan, filed September 3, 1993; AT&T Petition to Reject or, in the Alternative, to Suspend and Investigate NYNEX Telephone Companies Revisions to Tariff F.C.C. No. 1, Transmittal No. 311, filed July 25, 1994, pp. 6-8; AT&T Petition to Reject or, in the Alternative, to Suspend and Investigate, Cincinnati Bell Telephone Company Revisions to Tariff F.C.C. No. 35, Transmittal No. 658, filed July 27, 1994, pp. 5-6; AT&T Comments on Pacific Bell Petition for Waiver of Part 69 of the Commission's Rules to Offer Optional Pricing Plans, filed January 21, 1994, pp. 5-7.